

ADMINISTRATIVE OFFICE OF THE COURTS

SUPREME COURT OF NEW MEXICO

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MEMORANDUM

To: David Abbey, Director
New Mexico Legislative Finance Committee

From: New Mexico Administrative Office of the Courts

Subject: Water Rights Adjudications

Date: September 14, 2007

You requested that the Administrative Office of the Courts (the “AOC”) provide the Legislative Finance Committee (the “LFC”) with a description of the “generally accepted” or “preferred” procedures for adjudicating water rights, as determined by a survey of the adjudication laws of other Western States. This memorandum responds to your request.

I. Introduction

There is no “preferred” or “generally accepted” procedure for adjudicating water rights. For a variety of reasons, some states have not initiated so-called “general stream adjudications”¹ and a variety of different procedures are followed in those states that have initiated such adjudications. Of the states that have initiated general stream adjudications, some follow an administrative approach and others follow a judicial approach. In an administrative approach, contested water

¹ A “general stream adjudication” is an effort, normally undertaken by a state’s water resources agency, to determine the extent and priority of all water rights within a stream system. By way of contrast, a private adjudication is a judicial proceeding initiated by a water rights claimant against other named water rights claimants to determine the extent and priority of the water rights of the parties to the proceeding.

rights claims are resolved by the state's water resource agency (i.e. the equivalent of New Mexico's Office of the State Engineer), subject to a right to appeal to the district court. In the states that follow a judicial approach, disputed water rights claims are resolved initially by the district court. New Mexico follows a judicial approach.

Because there is no "generally accepted" procedure for adjudicating water rights, the AOC attempted to identify the "preferred" procedure by examining the procedures followed in states that satisfy two criteria: (i) the states adjudicate water rights judicially, rather than administratively, and (ii) a water judge or other official of the state reported to us that its judiciary is generally satisfied with the progress of their adjudications. The states whose adjudication practices we examined, based on these criteria, were Idaho, Montana and Colorado. The adjudication procedures in these states (the "Selected States") differ in many respects. But much to our surprise, we found similarities in their adjudication procedures that could account for much of their success in adjudicating water rights.

A word of caution. The adjudication procedures of the Selected States reflect the unique historical, hydrologic and political circumstance of those states. While there are important lessons to be learned from these states, there is no reason to believe that their adjudication practices can be imported into New Mexico "whole cloth."

II. General Propositions about Adjudication Reform

When examining the adjudication procedures in different states, we became aware of a number of problems and difficulties that are likely to be encountered by any state that attempts to comprehensively adjudicate the water rights of all of its citizens. Those problems can be synthesized into a short list of propositions that should guide any adjudication reform effort.

- A general stream adjudication is **not** simply a lawsuit writ large. At its core, an adjudication is little more than a "judicially blessed" technical investigation and inventory of all of the water rights in a stream system. This means that adjudication reform requires much more than reform of the litigation process. It also requires reform of the techniques for identifying, evaluating and monitoring changes in water rights ownership.
- General stream adjudications are inevitably expensive, time consuming and contentious processes. While ways exist for making adjudications

more efficient, less costly and less contentious, there is no “magic bullet” that will eliminate any of these problems.

- Inevitably there is a tradeoff between fair procedures and efficient ones. Procedures that improve efficiency will not be regarded as fair by water right claimants who are adversely affected by those procedures. Procedures that are particularly solicitous of claimants’ rights will lead to interminable delays and excessive cost. A proper balance between fairness and efficiency must be struck when designing adjudication procedures.
- Any effort to comprehensively reform adjudication procedures will be contentious and will likely produce constitutional and other legal challenges. Implementation of comprehensive reforms may be frustrated until the legal challenges are resolved.²
- A general stream adjudication is analogous to a manufacturing process in the sense that the steps in the process are interrelated and changing one step could adversely affect other aspects of the process. No reform of one aspect of the process should be undertaken without first assessing the impact of that reform on the other aspects.

III. A Comparison of Adjudication Procedures Of the Selected States with those of New Mexico

A. Similarities in Adjudication Procedures

A casual examination of the adjudication procedures in the Selected States would suggest that their procedures differ markedly from one another. However, a closer examination reveals underlying similarities in their procedures that do not exist in New Mexico. A comparison of the similarities among the Selected State with New Mexico’s approach should provide some insights into how to approach adjudication reform in New Mexico.

1. Comprehensive Statutory Scheme

² To cite just two examples, Idaho’s well regarded reform legislation was immediately challenged on constitutional grounds and Idaho’s Supreme Court stayed the adjudication proceedings until the constitutional challenges were resolved. Likewise, as discussed below, legislation in Arizona designed to simplify and expedite adjudications was challenged on constitutional grounds, and the Arizona Supreme Court ultimately invalidated much of the legislation.

The statute that governs water rights adjudications in New Mexico was adopted in 1907. The statute contains relatively little procedural guidance about how water rights are to be adjudicated. The procedure followed in New Mexico today is an outgrowth of the procedure the Office of the State Engineer (the “OSE”) developed when it was adjudicating water rights in the Roswell Artesian Basin in the 1950’s. While this procedure has withstood court challenges, New Mexico’s courts have ruled on the fairness—not the efficiency—of the procedure. By way of contrast, the legislatures of the Selected States have adopted comprehensive procedural statutory schemes for adjudicating water rights.

Idaho commenced its Snake River Adjudication in November, 1987 and paved the way for doing so by substantially revising its adjudication statutes the previous year. Idaho revised its statutes once again in 1994 to, among other things, change the role of its water agency from a party litigant in an adjudication to an expert witness. When measured against the adjudications of other states, the progress of the Snake River Adjudication has been remarkable. As of March 2007, the court had decreed 128,000 water rights and anticipated that the adjudication would be completed by 2010.

Montana enacted a comprehensive statutory scheme for the adjudication of water rights in 1979 and commenced a state-wide adjudication shortly thereafter. Progress in the adjudication was slow and a Montana Steering Committee white paper placed much of the blame on the lack of sufficient staffing at the water agency and the water court. At that time, the water agency had only three full-time claims examiners on staff. In 2005, the legislature imposed a fee on all water rights owners to fund the adjudication and, in connection therewith, imposed deadlines for the completion of the investigation and evaluation of claims by the water agency. The water agency now has 40 claims examiners on staff.

Although Colorado commenced the adjudication of its surface water rights in the late nineteenth century, it was not until 1969 that the state enacted a comprehensive adjudication statute providing for the integration of tributary groundwater into its adjudication inventory. Today, essentially all of Colorado’s surface and groundwater rights have been adjudicated pursuant to the 1969 legislation.

Because New Mexico does not have a comprehensive procedural scheme, a water rights adjudication is governed by the same procedural rules that apply to other law suits of a civil nature. However, adjudications differ from ordinary civil lawsuits in several respects and these differences can create procedural difficulties that undermine the efficiency and increase the contentiousness of an adjudication. Two examples will illustrate this point:

Example 1: Service of process is an example of an inefficiency that arises when an adjudication is characterized as an ordinary civil lawsuit. Because a New Mexico adjudication is an ordinary civil lawsuit, all the water rights claimants in a river basin must be joined as parties by service of process pursuant to New Mexico's Rules of Civil Procedure. Because there are inevitably thousands of claimants in a basin, the OSE must serve process on thousands of defendants. As discussed in more detail below, in the Selected States water rights claimants are not joined as parties to an adjudication. Rather, they are notified by less formal means that they must file water rights claims to protect their water rights and are deemed to have consented to the court's jurisdiction when they file their claims.

Example 2: Adjudications everywhere are contentious but the contentiousness of adjudications in New Mexico is exacerbated by the fact that an adjudication proceeds as an ordinary civil lawsuit. Water rights claimants are named as "defendants" in an adjudication even if there is no pending dispute between the OSE and the claimant. As a consequence, water rights claimants are often angered because they have been sued by the state even though they have done nothing wrong. In the Selected States, the validity of a claimant's water rights claim is assessed by the state's Water Agency and the claimant is named as a party to a contested proceeding only if the Water Agency challenges the claim.

2. Service of Process and Notice of the Adjudication

As stated above, in New Mexico each water right claimant whose identity is known to the OSE is formally served with process in the manner required by the Rules of Civil Procedure. In each of the Selected States, claimants are not formally served with process. Rather, either the Legislature or the Water Court has specified an alternative and less burdensome means for giving notice that claimants must file a formal water rights claim. Specifically:

- a) Idaho: Idaho's Water Agency serves notice of the adjudication by first class mail to the persons whose names appear on the real estate assessment records.
- b) Montana: the Montana Water Court has required that notice of the adjudication be served with the property tax assessments.
- c) Colorado: A Colorado statute mandates that water rights claimants file water rights applications with the Water Court. Claimants were not personally notified of the enactment of this statute but claimants are notified of all water court proceedings if they subscribe to a court published resume of those proceedings.

3. Filing of Claim

In New Mexico, the OSE identifies water rights claimants when it conducts the hydrographic survey. Water rights claimants have no obligation to (i) make their identities known to the OSE or (ii) identify with specificity the extent and priority of their claims. In each of the Selected States, claimants must file a claim with the Water Agency or the Court, and those who do not suffer harsh consequences. Specifically:

- a) Idaho: All water rights claimants are required to file a notice of claim with Idaho's Water Agency. "[F]ailure to file a required notice of claim will result in a court determination that no water right exists for the use of water for which the required notice of claim was not filed," Idaho Code § 42-1408(1)(c). In addition, those who do not file claims are "deemed to have been constructively served with notice" of the adjudication. As a consequence of this provision, all actions taken in the adjudication are binding on those claimants without the need for further notice.
- b) Montana: Pursuant to Montana's comprehensive 1979 adjudication statute, claimants who failed to file their water rights claims by the required deadline of April, 1982 forfeited their water rights. The politically sensitive nature of setting such a deadline is illustrated by the fact that in 1993 the legislature extended the deadline to July, 1996.
- c) Colorado: Claimants who did not file water rights applications with the Water Court by the required deadline (July 1, 1972) forfeited their priority. Specifically they were awarded a priority date junior to the priority date of all water rights claimants who filed by the required deadline.

4. Role of the State Engineer

In New Mexico, the OSE is the plaintiff in a water rights adjudication and commences litigation against each water right claimant on behalf of the State. In none of the Selected States does the Water Agency routinely litigate against the State's water rights claimants. Rather, the Water Agency examines water rights claims and makes recommendations to the court with respect to the disposition of the claims. Specifically:

- a) Idaho: In Idaho, the Water Agency acts as “an expert and technical assistant” to the court and is prohibited from appearing as a party to the adjudication. Idaho Code § 42-1401B. Any other agency of the State can appear in an adjudication through the attorney general and the attorney general can appear whenever he or she deems it necessary to represent the overall interests of the State.

- b) Montana: In Montana, the Water Agency acts as an assistant to and is subject to the direction of the water judge. When acting in this capacity, the State Agency conducts field investigations for the court and makes recommendations concerning the disposition of water rights claims. It also provides assistance to water rights claimants with respect to the filing of water rights claims. Although the Water Agency is permitted to file formal objections to water rights claims with the Court, we understand that Montana’s Water Agency rarely exercises that power.

- c) Colorado: Water rights applications are submitted directly to the court. The court sends the water agency copies of the application and the agency investigates the claim and submits a written report with recommendations to the court. A court referee then acts on the application within a set period of time. The agency’s investigation is technical and any proceedings before the referee are informal and non-adversarial.

5. Procedure Resolving Objections and *Inter Se* Proceedings

To determine the validity of all water rights in a stream system, two tasks must be accomplished: (1) The state must have an opportunity to examine and object to the validity of each water right claim and (2) each water right claimant must have the opportunity to object to the validity of all other claimants’ claims.

In New Mexico, these two tasks are performed during two distinct phases of the adjudication—the so-called “subfile” phase and the *inter se* phase. In the subfile phase (which is by far the most time consuming phase), the OSE assesses the validity of each water right claim and litigates the validity of claims it deems invalid. Disputed water rights claims are normally not heard by the Court until the State has served proposed “Consent Orders” on all claimants within the stream system or a particular segment of the system. In the *inter se* phase (which is nothing more than a formality in many adjudications), water rights claimants are provided with an opportunity to object to one another’s claims.

In each of the Selected States, both tasks are accomplished in a single proceeding. The requirement in the Selected States that claimants file claims with either the Water Agency or the Court sets in motion a procedure and timeline for filing and resolving objections from both the state and other claimants.

Specifically:

- a) Idaho: In Idaho, the director of the state’s water agency files with the court a “director’s report” setting forth the nature and extent of all of the water rights claims in a section of the river basin. The director’s report is deemed to be prima facie evidence of the nature and extent of the claimants’ water rights. Claimants who want to object to the report must file objections with the court within a specified time period. The court enters “partial final decrees” adjudicating all water rights to which no objections are filed promptly after the time for filing objections expires. Objections to claims are resolved by trials presided over by the court or a special master pursuant to the rules of civil procedure. Idaho Code Ann. §§ 42-1411 and -1412.
- b) Montana: The Water Agency must examine and verify the claims to a particular source of water and provide the court with information. The water judge in Montana first issues a preliminary decree based on the statements of claim, the information submitted by the Water Agency, and other factors such as compact requirements. Claimants have 180 day to object to the preliminary decree. After a 60-day counter-objection period, the water judge sets a hearing date. Possible changes to the temporary decree must be published for three consecutive weeks, and objections must be filed within 45 days of the last day of notice. A final decree is then entered, and a limited right to appeal is defined by statute. Montana Code Ann. §§ 85-2-231 – 85-2-235.
- c) Colorado: After an application is submitted to the Court, it appears in a monthly resume published by the Court. Objections must be filed by the end of the month following the publication date. The referee must then rule on the application within the following sixty days or refer the application to a water judge. Any person or the Water Agency then has twenty days from the date of the mailing of the hearing date to submit a pleading regarding the right.

6. Role of Judiciary

In New Mexico, the OSE submits to each claimant a so-called “Consent Order” which sets forth the OSE’s conclusions with respect to the nature and extend of the claimant’s water right. If the claimant agrees with the State’s

conclusions, the claimant signs the Consent Order and the Court routinely enters the order approving the claim. If the claimant refuses to sign the Consent Order, the court will conduct a trial to determine the nature and extent of the water right. In the Selected States, the Court assumes a more proactive role in the management of the claims review process. Specifically:

- a. Idaho: Claims are filed with the Water Agency, and the Agency investigates the claims. The Agency then compiles a “director’s report” that is filed with the district court. The rights described in the director’s report that receive no objections shall be decreed as reported. Objections to the director’s report are filed with the district court by a deadline specified in the Director’s Report, and both the claimant and the Water Agency can file supplemental information with the Court. Objections that are not resolved by settlement are referred to trial.
- b. Montana: Water right applications are submitted to the Water Agency and reviewed for errors and completeness. The Water Agency publishes notice of the application and describes the process for filing timely objections, and may certify issues related to the adjudication to the district court. Montana Code Section 85-2-214(1) states, “The water judge shall monitor the claim filing procedure for claims within his water division and make any orders necessary to assure timely and accurate compliance with the claim filing procedure.” The water judges focus on the priority basins designated by the Legislature, or designated by the water judge. The Montana Legislature has also set benchmarks for the number of claims the Water Agency must examine by a certain date.³ “The water court shall prioritize basins for the purpose of claims examination and reexamination” by the Water Agency.
- c. Colorado: A water rights application is submitted to the Court, and the clerk sends copy to the state engineer and division engineer. Any person, including the Water Agency, can oppose the application by filing a statement of opposition. The Court referee then acts upon the application, approving or disapproving of the application, whether or not objections have been filed. The referee can also refer the matter to the water judge. Protests to the referee’s decision are set for hearing before the water judge.

³ Montana Code Ann. § 85-2-271 (4)(b) The cumulative benchmarks are as follows:

Date	Total Number of Claims Examined
Dec. 31, 2006	8,000
Dec. 31, 2008	19,000
Dec. 31, 2010	31,000
Dec. 31, 2012	44,00
June 30, 2015	57,000

7. Water Courts

In New Mexico, two of the State's three active adjudications are presided over by a retired district judge who has no administrative support. The third adjudication is presided over by a sitting judge who maintains a full docket of non-water cases. In each of the Selected States, adjudications are presided over by a "water judge" who, depending on the State, has no other responsibilities or whose water responsibilities are deemed paramount. Specifically:

- a) Idaho: Idaho's massive Snake River Basin Adjudication is presided over by a single district judge who has no responsibilities other than the adjudication of water rights. The Snake River Court is situated in a courthouse in Twin Falls used solely for adjudications. The court's staff includes three special masters, one staff attorney, one case administrator, two deputy clerks and one court reporter.
- b) Montana: The Montana water court consists of four hydrographic divisions within the state. Although the statute authorizes one water judge presiding over each division, in practice the Chief Water Judge handles the majority of water cases, and infrequently calls upon two additional general jurisdiction judges who are designated to hear water cases. The court also employs twelve Water Masters, a Court Administrator, a Clerk of Court, and four Deputy Clerks of Court. Montana law specifies that "[c]ertified controversies must be given priority by a water judge over all other adjudication matters." Montana Code Ann. § 85-2-406 (2)(b).
- c) Colorado: The Colorado water court consists of seven divisions corresponding to the major watersheds in the state. There is one water judge and water clerk in each district with exclusive jurisdiction of all water matters; the water judges appoint as many referees as necessary in their division. Colorado Section 37-92-203 (2) states, "The services of the water judge shall be in addition to his regular duties as a district judge but shall take priority over such regular duties, and the schedules of the judges in the various divisions shall be arranged and adjusted so that the water judge shall be free to hear water matters." The Colorado Supreme Court can appoint an additional judge if necessary.

B. Differences in Adjudication Procedures

The adjudication procedures in the Selected States are by no means uniform. Some of the differences might also provide insights into how to approach adjudication reform in New Mexico.

1. Single vs. “Rolling” Adjudication: In New Mexico, Idaho and Montana, the adjudication of all water rights in a basin takes place in the context of a single adjudication. Colorado adjudicates water rights in what is referred to as a “rolling adjudication.” In Colorado, a claimant must file an application for a water rights decree with the Water Court and the filing of an application is deemed to be the commencement of a separate legal proceeding. If objections are filed to a particular application, the Water Court resolves the objections in a contested proceeding in which only the applicant and the objectors are parties. The Water Court’s decision in each proceeding is deemed a final judgment subject to immediate appeal. The decisions in each proceeding are binding on all water rights claimants under principles of *stare decisis*.
2. Interim Administration Subject to Court Supervision: Idaho’s adjudication statute authorizes their Water Agency to administer (e.g. enforce priorities) prior to the completion of an adjudication if (and only if) the court first authorizes interim administration. Specifically, in Idaho, the court may permit the state’s Water Agency to administer water rights in accordance with a so-called “director’s report” (which is analogous to New Mexico’s “hydrographic survey”) upon a determination that interim administration is “reasonably necessary to protect senior water rights.” Idaho Code Ann. § 42-1417
3. Federal and Indian Water Rights: Montana has a unique approach to resolving federal and Indian water rights claims. The legislature has created a Compact Commission which negotiates with the tribes and the federal government on behalf of the State over the nature and extent of their water rights. If the negotiations are successful, the resulting agreement (referred to as a “Compact”) is submitted to the legislature, Congress and the water court for approval. If approved, the Compact is binding on all water claimants in the state. Litigation before the water court over tribal and federal claims is suspended during the negotiation process.

The Compact Commission consists of nine members. Four Commission members are members of the legislature; two are appointed by the Speaker of the House and two are appointed by the President of the Senate. One member of the Commission is appointed by the Attorney General and the other four Commission members are appointed by the

Governor. The Commission's work is supported by a nine person legal and technical staff.

4. Pro Se Representation: Historically, the Montana Water Court has permitted particular entities, including family farms legally organized as corporations, to appear *pro se* through a shareholder in proceedings involving contested water rights. Although this practice has recently been challenged and is being studied, it continues today.

C. A Caution: The Arizona Experience

Arizona's experience with adjudication reform serves as a caution against precipitous legislative action in New Mexico.

Two adjudications are pending in Arizona-- the Gila River Adjudication, which was commenced in 1974, and the Little Colorado Adjudication, which was commenced in 1978.

In 1995, the Arizona legislature substantially amended Arizona's water code in response to fears generated by a hydrographic survey in the Little Colorado Adjudication. Most of these revisions were declared unconstitutional by the Arizona Supreme Court in 1999. Little of consequence occurred in either adjudication while this litigation was pending and the procedural morass of both adjudications continues to this day. According to a knowledgeable observer, no end is in sight for either adjudication. See Joseph M. Feller, *The Adjudication that Ate Arizona Water Law*, Ariz. L. Rev. 405 (2007).

IV Conclusion

At the hearing of the Water Adjudications Subcommittee in Clovis on July 17, 2007, the AOC identified four areas of activity that must be addressed to reform the water rights adjudication process in New Mexico: (i) reform of adjudication procedures, (ii) creation of a workable system for keeping track of changes in water rights ownership, (iii) prioritization and reallocation of resources at the OSE and (iv) court restructuring and reform. This memorandum lays the groundwork for making progress in two of those areas-- procedural reform and court reform—by identifying how other states have structured their adjudication processes.

A decision about whether some of the approaches used in other states should be incorporated into New Mexico's adjudication processes has political, legal, and budgetary ramifications that both the legislature and the executive branch must address. If, after considering these ramifications, a decision is made

to proceed with reform, the precise reforms must be identified and implemented in a thoughtful, deliberate and collaborative way or the reforms will fail.